



POLICE DEPARTMENT

July 27, 2012

MEMORANDUM FOR: Police Commissioner

Re: Detective Thierry Nemorin
Tax Registry No. 934022
Narcotics Borough Queens
Disciplinary Case No. 2011 3588

The above-named member of the Department appeared before the Court on February 1, 2012, and March 22, 2012, charged with the following:

1. Said Detective Thierry Nemorin, assigned to Queens Vice Enforcement Division, on or about and between August 26, 2010 through September 1, 2010, at a location known to this Department, in Queens County, did fail and neglect to properly safeguard his Glock 9mm service revolver, Serial No. FUN174, as required.

P.G. 204-08, Page 2, Paragraph 7 FIREARMS GENERAL REGULATIONS

The Department was represented by Chai Park and Beth Douglas, Esqs., Department Advocate's Office. Respondent was represented by James Moschella, Esq., Karasyk & Moschella LLP.

Respondent, through his counsel, entered a plea of Not Guilty to the subject charges. A stenographic transcript of the trial record has been prepared and is available for the Police Commissioner's review.

DECISION

Respondent is found Guilty as charged.

SUMMARY OF EVIDENCE PRESENTEDThe Department's Case

The Department called Lieutenant James Micozzi and Detective Etienne Mauge as witnesses. The official Department interview of retired Sergeant Person A also was admitted as evidence.

Lieutenant James Micozzi

Micozzi was assigned to the Organized Crime Control Bureau Investigations Unit (OCCBIU). He investigated a matter involving Respondent regarding the allegation of a lost or stolen firearm from a Department facility. The missing firearm was a Glock 9 millimeter semi-automatic pistol, serial number FUN174.

Micozzi first was notified of the allegation on September 1, 2010, shortly after 1800 hours. Sergeant Person A from the Queens Vice Enforcement Squad (QVES) reported that Respondent had stated that his firearm was missing from his locker. Micozzi then notified the Internal Affairs Bureau (IAB) and the Crime Scene Unit (CSU) to respond to the scene, located in the Narcotics Borough Queens building.

Micozzi arrived at QVES at approximately 2000 hours, accompanied by Sergeant Daniel Magnome from his office. The two went to the second floor and met with Person A. The three then proceeded downstairs to the basement where the lockers were located so Micozzi could look at the locker himself. Person A informed Micozzi that after Person A had searched Respondent's

locker to verify the gun was not hidden or had fallen, he posted a detective to guard the aisle in which the locker was located, in order to prevent anyone from disturbing the scene.

Micozzi described the locker as the standard locker used by most of the Department. It was gray metal, approximately six feet tall, and a little more than two-and-a-half feet wide. It was completely closed, shut and flush with the exterior frame, and secured with a Master combination lock through the hole in the handle.

During his observation, Micozzi did not touch the locker in order to prevent contaminating the scene before CSU was able to dust for fingerprints. IAB also participated in the investigation at the scene. Present at the scene from CSU were Detective Etienne Mauge and Detective David Streichert.

IAB originally was the lead investigatory unit on the case. Micozzi was assigned the matter on September 16, 2010, when OCCB took over the investigation.

Micozzi determined that IAB had no other records of property being stolen or lost from “that facility where Queens Narcotics was located in.” Micozzi also conducted official Department interviews of Person A and Respondent as part of his investigation.

In Micozzi’s opinion, the gun was not stolen or forcibly removed from Respondent’s locker. He explained that this opinion was based on several factors. First, during his initial observation of the locker, he did not see any “discernable” markings that would indicate that someone had pried the locker open or somehow defeated the locking mechanism of the locker. Second, CSU also came to the conclusion that the locker was functioning properly and in working condition and was unable to see any other way someone could gain entrance into the locker. IAB arrived at the same conclusion.

On cross examination, Micozzi admitted that prior to his arrival at the scene, several hours after the incident had been reported, Respondent and Person A had both entered the locker

and subsequently placed it in the locked position. As such, the locker was no longer in the exact condition as when Respondent first approached his locker earlier in the tour on September 1, 2010.

Micozzi clarified that when he said no “discernable” marks on direct examination, he meant obvious marks, which in his experience would be present if someone had attempted to pry the locker open with some type of tool. He conceded, however, that a “fingertip” would not cause any discernable marks.

During Respondent’s official Department interview, he provided Micozzi with four photographs purporting to demonstrate that someone could gain access to his locker while it was closed and locked. Respondent informed Micozzi that he had taken the four photographs with his cellular phone camera and then printed them out, but Respondent never showed Micozzi his cellular phone.

The photographs given to Micozzi were introduced into evidence. Respondent’s Exhibit (RX) A was a photograph depicting the door of the locker being opened several inches, wider at the bottom, while a person’s fingers held the door open. RX B showed the row of lockers. RX C was a close-up photograph of the locker in which the typical stickers are visible. RX D depicted someone grabbing the padlock with the door open approximately one inch.

Micozzi confirmed that on the night of the initial investigation, Respondent informed him that when he first approached his locker, he noticed that the door was not flush with the frame. Respondent informed Micozzi that he did not think anything of the locker condition until he realized the firearm was missing. Person A informed Micozzi during his official Department interview that Respondent told him the locker was not flush and something was “off” about the locker when Respondent first approached it.

Micozzi agreed that it was permissible for Respondent to store his firearm in his official Department locker. As such, Micozzi agreed that if someone were somehow able to defeat the lock on the locker and remove Respondent's firearm from his locker while it was in the locked position, such an instance would not be a failure on the part of Respondent to safeguard his firearm.

Additionally, Micozzi agreed that for Respondent's testimony to be true, the firearm would have been taken sometime after Respondent left work on Thursday, August 26, 2010, and before Wednesday, September 1, 2010, when he discovered it was missing. On Friday, August 27, 2010, Respondent was promoted to Detective. No roll calls or sign-in/sign-out logs were analyzed to indicate who was present in the building that weekend.

On re direct examination, Micozzi testified that Respondent stated in his official Department interview that he took the RX A photograph a few days after September 1, 2010, and not on that night. The photograph depicted the lower half of the locker. Respondent said in his interview that he routinely kept his firearm in its holster on the top shelf of his locker. The top shelf was not visible in RX A.

Respondent also informed Micozzi during his interview that he took the RX B photograph later on during the evening of September 1, 2010, after the investigation was completed by IAB, CSU and ●CCBIU. The door to Respondent's locker in that picture was not completely shut and flush with the locker frame. However, according to Micozzi, Respondent's locker was not in the condition depicted in RX B when Micozzi observed it. The rest of the photographs were taken several days after the incident occurred.

On re-cross examination, Micozzi admitted that he did not attempt to see if the locker could be opened in the manner depicted. He further agreed that if someone were to open the door in the manner depicted in RX A, there would be no discernable marks on the door to

indicate that it had been manipulated. Micozzi confirmed that Respondent indicated in his interview that RX B illustrated Respondent's attempt to duplicate the locker as he first saw it on September 1, 2010, and was approximately as it appeared at that time.

Official Department Interview of Retired Sergeant Person A

(see Department's Exhibit (DX) 1, recording; DX 1a, transcript)

Person A was working September 1, 2010, from 1600 to 0000 hours. During Person A's tour, at approximately 1625, Respondent approached Person A and asked to speak to him. Respondent informed Person A that his firearm was missing. Person A asked Respondent if he was positive the firearm was missing and whether he had looked everywhere for it.

Person A and Respondent did an immediate canvass of Respondent's desk and locker to ensure that it was not locked in his desk, under some papers or within the locker. They did not find the missing firearm at that time.

Person A stated that Respondent used the prisoner van the last time they did enforcement on Thursday, August 26, 2010. Respondent's tour that day was 2125x0600. Person A called central booking and the 113 Precinct, where they had lodged prisoners, with "negative results."

When Respondent approached Person A on September 1, 2010, Person A asked Respondent about the condition of his locker. Respondent informed Person A that it was "a little ajar." Person A then asked him if it was closed, and Respondent stated that it was closed, but a little ajar at the top part of the locker. Person A clarified that Respondent was not saying the whole door was not fully closed, but only the top part was a little out from the frame. Respondent did not mention that there was anything obstructing the locker from being closed, nor did he state that it was not the condition in which he left his locker.

Person A then called his commanding officer, who said he would make the notifications. Person A assigned a detective to guard the locker and safeguard the crime scene. At some point in time, IAB and CSU responded.

That same tour, likely after midnight and after the initial investigation, Person A gave Respondent the paperwork to go to the range and receive a loaner gun. Respondent then informed him that his locker was more than ajar, that it was open more as if someone could put her hand in it. Respondent also stated that he had opened the locker and re closed it completely and secured the lock. Person A never saw the locker in the condition Respondent described it as having been in. When Person A looked at the locker he saw no indication of physical damage or signs of forceful entry.

Detective Etienne Mauge

Mauge had been assigned to CSU for four years. On September 1, 2010, Micozzi requested that CSU respond to the Queens Narcotics building. The report was that a member of the service, returning from his regular days off, discovered his firearm was missing from his locker.

Streichert accompanied Mauge to the location. When they arrived at approximately 2030 hours, Micozzi and several other supervisors from IAB were present. Upon arrival, Mauge observed that the locker room was located in the basement of the facility, well lit and safeguarded by a detective.

Mauge described Respondent's locker as gray, metal, approximately two-and-a-half feet wide, with a sticker displaying Respondent's name affixed to the door. The door was completely closed, flush against the locker, with the lock in the locked position.

Mauge put on gloves and pulled the locker “[a]bout twice” to see if it was secure, locked and operable. It was secure and remained in the locked position when he tested it. While he pulled on the lock, and afterwards, he did not see any separation between the locker door and the frame as depicted in RX A and RX D. Additionally, Mauge stated that when he first arrived, the locker did not appear as it did in RX B and RX C.

Mauge photographed the locker and dusted it for fingerprints. While conducting his investigation on September 1, 2010, Mauge took 13 photographs, DX 2a-m. DX 2b-c depicted Respondent’s locker aisle. DX 2d-e depicted the full length of Respondent’s locker door. DX 2f was the top of the locker door. DX 2g-h depicted the middle portion of the door. DX 2i depicted the bottom portion of the door. DX 2j showed the top to middle portion of the door. DX 2k-m were depictions of the door after it was dusted for fingerprints.

On cross examination, Mauge stated that he was aware the locker had already been accessed prior to his arrival at the scene that evening, and specifically that Respondent had already opened and closed the locker. Mauge confirmed that there was no discernable or visible damage to the lock when he pulled on it. He admitted that he did not attempt to open the locker in the manner depicted in RX A, nor did he conduct any other physical test on the locker to see if it could be accessed, other than pulling on the lock.

Mauge found no usable fingerprints on the locker, even Respondent’s. He only found smudges, smears and grease on the door. He also dusted for fingerprints on the combination lock, but did not obtain any fingerprints of value there either.

On re-cross examination, Mauge testified that when he pulled on the lock he only was trying to test the lock itself and was not trying to force the door open. He did pull on it hard, but simply was trying to open it the way he would open a Master lock on his own locker.

Respondent's Case

Respondent testified on his own behalf.

Respondent

Respondent had been assigned to the vice module in Queens for about four years. Prior to September 1, 2010, his service weapon was a Glock 9 millimeter. The last time Respondent saw this firearm, prior to the incident in question, was at approximately 1000 hours on Thursday, August 26, 2010. He had handled a prisoner van assignment and went to the locker room afterward.

Respondent's common practice was to arrive at work with his off-duty weapon, a Smith & Wesson 9-millimeter, unholster it, and place it in his locker. He generally took his service weapon when going out to do enforcement. He would secure his service weapon into his holster, located at his right hip.

After the tour, Respondent placed the weapon in his locker on the top shelf, as was his practice, along with other items, like his vest and handcuffs. He prepared for his promotion to Detective the next day, Friday, August 27, 2010, and went end of tour. Because he was expected to wear his dress uniform for the promotion ceremony, he prepared his white gloves, hat device, and collar brass. He used his off-duty weapon, a Smith & Wesson 9-millimeter, for the ceremony.

The only time Respondent brought his service weapon home was when he would go to the firing range the following day for training.

Respondent did not report to his office after the promotion ceremony. He took a vacation day on Saturday, August 28, 2010, and his regular days off were Sundays and Mondays. He

returned to work on Tuesday, August 31, 2010. This was an administrative day, meaning that he worked on paperwork rather than enforcement.

When asked whether he went to his locker at any time on August 31, 2010, Respondent replied, "Yeah, I was out in the field for a little while, then we came back to the command." He went to the bathroom in the locker room, first stopping at his locker for his toilet paper. He did not retrieve any equipment from his locker at that point, nor did he look for his firearm. When Respondent closed his locker at that time, he locked it. He did not attempt to retrieve his firearm from his locker at any time that day.

Respondent was scheduled to work a 4x12 tour on September 1, 2010. Upon arriving for his tour, Respondent went to the locker room to retrieve his firearm. As he approached his locker he noticed something was wrong with it but did not think anything of it at that moment. The locker was slightly ajar or "sticking out a bit," as depicted in the photos he took later. Respondent testified that it looked as if his locker had not been properly closed, similar to the way the locker looked in RX B. That photograph was taken to show how Respondent saw his locker prior to opening it that day.

Respondent testified that the reason he did not think anything of the condition of his locker when he first arrived was because it seemed completely shut with the lock still affixed and he had to use the combination to open the lock. Respondent stated that, unlike as depicted in DX 2d, his locker was not completely flush with its frame when he first viewed it on September 1, 2010. When he opened his locker he discovered his firearm was missing.

After searching through his locker, he "shut my locker, closed it," and went to notify Person A that his firearm was missing. At that time Person A informed Respondent that a search would have to be done and that they would have to contact Respondent's teammates. Person A

also told Respondent to “ask around.” Respondent and Person A also checked around the command, looked in vehicles, and asked if anyone was safeguarding the firearm.

Shortly after Respondent informed Person A of the missing firearm, they prepared a complaint report for larceny of the firearm. Person A prepared the report, but Respondent assisted him by providing all relevant information. He told Person A that the locker was slightly ajar when he first approached it.

While Respondent and Person A were searching for the missing firearm, Respondent was under the impression that it was a game or prank that other members of his team were playing on him after his promotion to Detective. It was not unusual for them to play pranks on Respondent ever since a prior incident that had delayed his promotion for about two years. Respondent had been involved in an off-duty incident in which he was found unfit for duty, attended rehabilitation, and forfeited 20 penalty days.

After the investigation was completed, Person A showed Respondent a ‘49,’ i.e., the results of the investigation. This stated that there was no damage or forced entry into his locker and that there was nothing wrong with his locker. That information seemed odd to Respondent, so he informed Person A again that there was something initially wrong with his locker and asked Person A to go downstairs to the locker room with him. Respondent then took pictures to show the investigators the condition his locker was in when he first arrived. This was done approximately an hour or two after CSU left. Respondent later gave those photos to Micozzi.

Respondent also took a video of his locker about a week before March 22, 2012, one of the dates of trial (see RX E). He created the video at QVES, with the help of other Department members, and used his locker. No one had been assigned to the locker since September 1, 2010.

The video was played in court. Respondent was depicted in the video. At the beginning of the video, Respondent showed how the locker door was flush with the door frame as the CSU

detective had stated. However, Respondent proceeded to show that by pulling on the lock of the locker, the lower portion of the door opened giving him access to the bottom of the locker, providing him with sufficient space to insert his hand. Respondent stated that the lock was locked during the demonstration. Additionally, in the video Respondent demonstrated, as he had recently discovered, that after he had pried open the lower portion of the door, if he pulled hard enough on the locker while holding the base with his right hand, the door would open completely, even though the lock remained locked.

On cross examination, Respondent described the top shelf of his locker as a metal shelf that extended from the locker door to the back of the locker.

Some of the photos Respondent submitted to Micozzi were taken by him, while others were taken by a detective who was in the locker room a few days after the investigation at the time Respondent was taking the photos.

Respondent stated that although he only recently discovered that the door could be opened completely, he knew that the locker was in the same condition as it was on September 1, 2010, because he was the only person with access to the locker. Further, although he had opened his locker since September 1, 2010, and prior to making the video, he was certain that the locker was in the same condition it was in on September 1, 2010.

On re-direct examination, Respondent testified that after opening the locker in the manner depicted in RX E, the locker could be closed again by banging the door shut, at which point it would appear as if it had never been opened. If someone simply closed the locker it would shut and then slightly open immediately.

During re-cross examination, Respondent clarified that in order to completely close his locker after it was opened in the manner depicted in RX E, he would have to "physically bang" the locker once or twice so the door did not appear ajar as it was when he first observed it on

September 1, 2010. However, if the locker was in that state, simply pulling on the lock itself would open the door.

Upon questioning by the Court, Respondent clarified that when he closed his locker again after realizing his firearm was missing, he paid extra attention to making sure the lock was closed. He returned to the locker four or five times during the course of the evening to check for the firearm before CSU arrived. Every supervisor that arrived would ask him to go into his locker and remove everything to ensure the firearm was not in the locker under clothing or some other object. He did as they requested.

FINDINGS AND ANALYSIS

Respondent is charged with failing to safeguard his service firearm, a Glock 9 millimeter pistol. Respondent testified that on Friday, August 27, 2010, he was to be promoted to Detective as a member of the Queens Vice Enforcement Squad. August 26, 2010, was his last tour before promotion. He testified that after transporting prisoners, he placed his service weapon in his locker in the locker room of his command. This was a standard full-length and full-width Department locker. Respondent locked it using a removable Master lock. He took his off-duty weapon to the promotion ceremony the next day.

Over the next few days, Respondent testified, he was either off-duty or at work performing administrative tasks like paperwork. He entered his locker for other items but did not look for or retrieve his gun. September 1, 2010, was his first day of enforcement duties as a Detective. When he opened his locker to retrieve his service weapon, it was not there. He notified his direct supervisor, now-retired Sergeant Person A. Person A directed a subordinate to secure the crime scene and notified their commanding officer. Various notifications were made, including to the Internal Affairs Bureau, OCCB Investigations and the Crime Scene Unit.

Mauge, the CSU detective, photographed the scene. He testified that the door of the locker was flush with the frame. He dusted for fingerprints, but there was nothing of value, only smudges and smears.

Respondent asserted that he secured his firearm in his locker, but that someone played a prank on him as a result of his first day of enforcement as a newly-promoted Detective. He introduced photographs (RX A-D) and a video (RX E) into evidence purporting to show that someone could open the locker, even though the Master combination lock was locked. This was done by pulling at the lock itself, out from the locker. If one pulled hard enough, the door would open slightly. If one pulled even harder, the entire door would open. This apparently was because the lock only attached the door to the internal locking mechanism; the latches from the locking mechanism to the door frame still could detach from the frame.

Some description of the internal workings of the police locker is necessary. The Court has taken judicial notice of this matter. The bolt of the combination lock is inserted into a metal loop. The loop can be lifted up, and when it is lifted up, the long metal shaft on the inside of the door detaches from three latches located at the top, middle and bottom of the door frame.

The photographic evidence demonstrates that it was possible to open the locker shown in those photographs without unlocking the combination lock. But that is not the end of the inquiry – there are many other questions.

The strongest proof possessed by the Department was the testimony and photographs of the investigators. This included the lead investigator, Micozzi, of OCCBIU, and Mauge, of CSU. They testified that when they saw the locker, the door was flush with the frame. Respondent testified that when he first saw the locker on September 1, 2010, the door was not flush with the frame. It was “slightly ajar,” similar to what was portrayed in the RX B photograph.

Person A's account, introduced as the hearsay of his official Department interview as he has now retired, differed from Respondent's. Person A said that Respondent first told him that the locker was slightly ajar. He later told Person A it was more than ajar; it was "open more." Nevertheless, Respondent told Person A that he completely closed and secured his locker after discovering his firearm was missing. This ostensibly explained why the door appeared to be flush with the frame even though, according to Respondent, it had been tampered with.

One problem with Respondent's account is that the video did not show the condition of the locker door after he opened it using the brute-force method. The camera operator lost focus and moved away from the scene after Respondent began to close the door. Thus, it is unknown whether the door would re-close completely, or to the slightly-ajar position, after it was opened in the manner demonstrated by Respondent.

The next problem with Respondent's account is that we do not know whether the locker in the video was securely closed and locked. It appears to be so, but there is no way of knowing. If, as noted, the latches on the door frame are not securely attached to the metal shaft of the door, the locker is not safeguarded. Thus, the question of whether a truly secured locker can be opened using the brute-force method shown in RX E has not been answered.

The still photographs, RX A-D, also are an important factor in the case. Respondent testified that he closed the locker securely after finding it slightly ajar, and went to inform Person A. This accounts for the flush appearance seen by investigators. But Respondent also testified that he took RX A-D after the investigators left to attempt a re-creation of the locker's appearance when he first saw it on the first of September. The result was a door not completely flush with the frame. In order to get it that way, he had to close the door in a way that was not completely secure. The matter raises questions about whether Respondent ever closed his locker

securely on August 26, 2010. This is important because if he did not close it securely, he would have failed to safeguard his firearm.

Respondent suggested that someone from his command was playing a joke on him because, on September 1, 2010, he had just been promoted to Detective and had some disciplinary trouble in the past. The argument was that someone would want to prank a new Detective. But September 1, 2010, was not Respondent's first day at the command as a Detective August 31, 2010, was. On that last day of August, Respondent testified, he was doing paperwork rather than enforcement, so he did not need his gun. He also testified, however, that "I was out in the field for a little while, then we came back to the command." The Court does not understand how Respondent could have been "in the field" without taking even his off duty weapon – and he testified that his common practice was to use only his service weapon for enforcement. Even if Respondent considered his "field" duty not to be "enforcement," and therefore took his off duty weapon with him, keeping it on him when he arrived for work, and thus never had to enter his locker, he still would have needed prior permission from his commanding officer to be armed with it on duty. Respondent testified to none of this.

Nor does the Court understand how Respondent could have looked in his locker for toilet paper and not realized that the gun either was there or not. Finally, if Respondent's colleagues were going to play a joke on him, the "proper" time to do so would have been Respondent's first day back, which was August 31, 2010, not the day after.

In sum, the Department proved that it was more likely than not that Respondent failed to safeguard his firearm "on or about and between August 26, 2010 through September 1, 2010," either by failing to secure his locker or by other means. This does not mean that Respondent is lying about having secured his locker. It is possible that he attempted to secure his locker and thought he did, but did not in fact secure it. As such, Respondent is found Guilty.

PENALTY

In order to determine an appropriate penalty, Respondent's service record was examined. See Matter of Pell v. Board of Education, 34 N.Y.2d 222, 240 (1974). Respondent was appointed to the Department on January 20, 2004. Information from his personnel folder that was considered in making this penalty recommendation is contained in an attached confidential memorandum.

Respondent has been found Guilty of failing to safeguard his firearm. He stated that he locked his service weapon in his Department locker at his command. In fact, the evidence showed that he failed to secure the locker.

Precedent indicates that an appropriate penalty for such misconduct is the forfeiture of 20 vacation days. See, e.g., *Case No. 85517/09* (Jan. 26, 2010) (19-year police officer with no prior disciplinary record received 20 days for failure to safeguard firearm; the weapon was stored in his locker and there was no evidence of lock being damaged or vandalized); *Case No. 85521/09* (Jan. 12, 2010) (8 year officer with no record received 20 days for failure to safeguard; the weapon was in his locker, and when he went to retrieve it, he said it was missing – yet there was no sign of vandalism or damage to lock or locker).

The Department requested a penalty of 25 days' forfeiture, based upon Respondent's prior disciplinary history, see Confidential Mem., infra. The prior misconduct, however, was distinct from that of the instant case. Here, no false statements were alleged in the specifications, much less proven. No pattern of misconduct was established. Accordingly, the Court recommends that Respondent forfeit 20 vacation days as a penalty in this matter.

Respectfully submitted,



David S. Weisel
Assistant Deputy Commissioner Trials

APPROVED



DEC 03 2012
RAYMOND W. KELLY
POLICE COMMISSIONER

POLICE DEPARTMENT
CITY OF NEW YORK

From: Assistant Deputy Commissioner Trials
To: Police Commissioner
Subject: CONFIDENTIAL MEMORANDUM
DETECTIVE THIERRY NEMORIN
TAX REGISTRY NO. 934022
DISCIPLINARY CASE NO. 2011-3588

Respondent was rated 4.0 "Highly Competent" on his last three annual performance evaluations. [REDACTED]
[REDACTED]

Respondent has been the subject of one prior disciplinary adjudication. In 2009, he was found Guilty of consuming an intoxicant to the extent that he was unfit for duty. He also was found Guilty of giving evasive answers to Department investigators. For his misconduct, he forfeited 20 vacation days and agreed to cooperate with [REDACTED]

For your consideration.



David S. Weisel
Assistant Deputy Commissioner Trials